



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MISC. CRIMINAL APPLICATION NO. E042 OF 2021

MESRET BERIHU 1ST APPLICANT
TIGISTE TESFAYE 2ND APPLICANT
TESFAMHIRET MEHARI 3RD APPLICANT
YOSEF GEBREYESUS 4TH APPLICANT
BINIAM KEFETE 5TH APPLICANT
MUSIE NEGUSE 6TH APPLICANT
MELES HAMID..... 7TH APPLICANT
SISAY HAGOS..... 8TH APPLICANT
HERMAN ZENIT..... 9TH APPLICANT
FILMON WELDU 10TH APPLICANT
SAMORAWIT FISHA..... 11TH APPLICANT
YERUSALEM ALAZAR..... 12TH APPLICANT
ARSEMA BERHANE..... 13TH APPLICANT
AMLEST GIRMAY 14TH APPLICANT
SEGEN TEKLOM 15TH APPLICANT
SEM HAR TESFALEM 16TH APPLICANT
RUTA GEBREHIWET 17TH APPLICANT
YOHANIS BERIHU 18TH APPLICANT
AMINE BERIHU 19TH APPLICANT

VERSUS

REPUBLIC RESPONDENT

KITUO CHA SHERIA 1ST INTERESTED PARTY

JUMA THOMAS SARBO 2ND INTERESTED PARTY

BARBE GAMBO 3RD INTERESTED PARTY

RULING

1. I have a motion dated 6/5/2021 and brought pursuant to **362 of the Criminal Procedure Code and Section 11 (1) (3), 13(a) 18 (a) & (b) of the Refugee Act, No. 13 of 2006** seeking in the main that the OCS, Kumama Kulamawe police station be compelled and directed to release the 19 applicants, being Eritrean Nationals, seeking asylum in Kenya, to the Refugee Affairs Secretariat for purposes of processing and registration as Asylum seekers. There was also a facilitative prayer, that the court bars the P.M.'s court at Isiolo from taking plea for the applicants.

2. The factual groundings of the application are that the applicants, who are 15 adults including an expectant mother and four children, are Eritrean Nationals, were arrested within Kenyan territory on the 26/3/2021 and have all along been in custody and have not taken a plea on the basis that they are fleeing from adversity at home and are apprehensive that upon taking plea they will be repatriated back to the same hostile environment back home. The factual situation is then applied to the provisions of the **Refugee Act**, with its foundations in **Article 33 UN convention of Refugees, 1951**, which enacts the principal of Non-return of Refugees. **Section 11 (1) 8(3), 13(a) and 18** are relied upon for the proposition that once in Kenya, the applicants were on their way to Nairobi to the offices of the Refugee Affairs Secretariat to make their intentions known.

3. Counsel referred to the reports by the Refugee Affairs Secretariat, on the 19 applicants, dated 16/4/2021, and concerning Isiolo Case No. E0321 of 2021 which asserts that the applicants had established a bona fide asylum claim under **Section 11 of the Act** and thus entitled to the benefit of non refoulement principle under **section 18 of the Act**. There was also exhibited and relied upon a letter by the secretariat, dated same day, requesting that the applicants be escorted to Kakuma Refugee camp for further processing. All that was put further to bolster the position that the secretariat has taken up the matter.

4. In opposing the motion the office of the Director of Public Prosecutions filed grounds of opposition whose gist is that the sole intent of the application is to delay the proceedings in CR CASE NO. E0321 of 2021; that it is misleading and full of half-truths, lacks merit, an abuse of the court process deserving no entertainment by the court but ought to be struck out. To the counsel **Section 11 of the Act** mandates that any person entering Kenya to seek asylum must make their intention known at the earliest opportunity and at the nearest police station or authority yet they were arrested over 400 kilometers into Kenyan territory. To counsel, there was no evidence that the applicants were asylum seeking to merit being entertained by the court. He feared that the court may be entertaining an invitation to convert criminals into refugees in Kenya. Counsel underscored the fact that the applicants here, from the charge sheet, were charged with other six (6) who faced the charges of human trafficking, pleaded guilty and were convicted and fined. He urged that the motion be dismissed for want of merits and further that the court to infer that an application for asylum was made and rejected.

4. In his rejoinder counsel for the applicants submitted that the applicants were all headed to Nairobi when they were arrested, that the six who pleaded guilty were Kenyans whose plea effects not the status of the applicants and that there was no evidence that an application for asylum has been made and rejected.

5 From the papers filed and submissions made, the issue that isolate itself for determination here is whether the applicants have demonstrated to be asylum seekers and if an order should be made to protect their rights against refoulement.

6. The object of **Refugees Act, No. 13 of 2006**, is to recognize, protect and manage refugees and for connected Purposes. The Act give five definitions of a person to qualify as a refugee. For the purposes of this matter, I find that the applicants have, on the basis of the report from the Refugee Affairs Secretariat, the statutory body mandated to be responsible for all administrative matters concerning refugees in Kenya and to coordinate activities and programs on refugee[1], to be refugees on the basis that they are out of their country for a well-founded fear of persecution[2].

7 Parliament has, by its own wisdom and constitutional mandate, bestowed upon the secretariat, as a public office, the duty, which I consider to be exclusive, of administration of all refugee matters and coordination of programs and activities concerning refugees in Kenya and I consider that its determination of whether one has a bonafide asylum seeking claim falls for the exclusive determination by the secretariat.

8. Accordingly, there being no challenge to the findings of the report by the secretariat that the applicants have established a bonafide asylum claim, I find no merit in the two assertions by the prosecution that the applicants could be criminals hiding behind the right to asylum seeking and that I should draw an inference that an application for asylum had been made and declined.

9. I find that the applicants' bonafide asylum claim established by the secretariat herein remain uncontroverted and incontrovertible. That being the case I find that they need to be handed over to the Secretariat for purposes of having their applications process in accordance with the law.

10. Having so found and in accordance with the proposal by the secretariat, I direct that the applicants, all the 19, be escorted under the supervision of the secretariat to Kakuma Refugee Camp. That be done forthwith but in all events within 4 days from the date this decision shall have been served upon the in-charge, Isiolo G.K. prison and any other facility where they may be currently held.

11. For avoidance of doubt, this determination has the effect of barring further prosecution, including taking of plea, of the applicants in Isiolo P.M. CR.C NO. E321 of 2021.

12. Before I conclude, there was an issue raised by the prosecution, being that the applicants had a duty to report their entry into Kenya at the earliest opportunity and to the nearest immigration officers of the border point, the chief of the nearest police station, which deserve my short comment. That submissions must have been made on the basis of **Section 11 (1) as read with subsection (3) of the Act**.

13. My reading of the provisions is that once one seeking asylum enters Kenya; he is expected to make his intention known to the Commissioner for Refugees immediately upon enter. That section is to this court clear that the intention be made known to the Commissioner and nobody else. I do not construe the statute to confer upon any other agency or indeed any other office the duty to receive intentions of an asylum seeker. In my assessment, refugee affairs with its potential to disrupt public good if not properly regulated and administered, cannot be let in the hands of different offices.

14. To the country, I find that even reference to appointed officer under **Section 11 (2) and 4** cannot support the interpretation that the intention be made known to persons other than the commissioner. My reading of the statute gives me the interpretation that, appointed officers are only permitted to receive applications from persons who have been lawfully present in Kenya but whose lawful presence expires and would want to regularize further stay. That is the interpretation that I find to sit in consonance with the powers and duty of an appointed officer under **section 22 of the Act**. In the section I do not find declaration of intention to seek asylum as one of the duties of an appointed officer. I make these comments in disagreement with the prosecution that the applicants were obliged to make their intentions of seeking asylum known to the area chief, a police officer or an immigration officer at the border point or the nearest of such offices.

15. The upshot is that the application succeeds, further prosecution of the applicants on the basis of the charge sheet in Isiolo PM CR.C NO. E321 OF 2021 is prohibited to enable the applicants be handed over to the Refugee Affairs Secretariat within 4 days after the order is extracted and served.

Dated, signed and delivered at Meru, **by MS Teams** this 4th day of June, 2021

In presence of

Mr. Ouma & Ms Kore for Kitheka for applicants

Mr. Otieno for Interested party (Kituo Cha Sheria)

Mr. Maina for the state

PATRICK J O OTIENO

JUDGE
